SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 96

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

BRIEF OF THE APPELLANT

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BRIEF OF THE APPELLANT

This appeal is from an order of the Supreme Court of Ohio dismissing the appeal of Appellant from the Court of Appeals, First Appellate District, State of Ohio, and from the judgment of the latter Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio appears in 175 Ohio St. 468 and 196 N.E.2d 87. The opinion of the Court of Appeals, First Appellate District, State of Ohio, appears at 196 N.E.2d 114.

JURISDICTION

Jurisdiction in this case is predicated upon 28 U.S.C., section 1257(2). This appeal draws in question the validity of certain taxing statutes of the State of Ohio on the ground of their repugnancy to the Constitution of the United States, which repugnancy the Ohio courts refused to recognize in deciding in favor of the validity of such statutes.

Appellant's appeal to the Supreme Court of Ohio was dismissed on January 22, 1964 (R. 26). Notices of appeal to this Court were timely filed on March 20, 1964 (R. 27, 29), and this Court noted probable jurisdiction on October 12, 1964 (R. 31).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appellant relies upon the Fourteenth Amendment to the United States Constitution, and more particularly the "equal protection of the laws" clause of section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C., Const. Amend. 14, § 1.)

The Ohio statute specifically involved is section 5711.01 of the Revised Code of Ohio, under which the Appellant, a foreign insurance corporation, is defined as a "taxpayer" for *ad valorem* personal property tax purposes, while domestic insurance companies are "excluded" therefrom. Also directly involved is section 5725.25 of the Revised Code of Ohio providing that in the case of domestic insurance companies, franchise taxes and real estate taxes "shall be in lieu of all other taxes" against them or their property. The texts of these two sections and of other relevant sections (5709.01, 5709.02, 5709.03, 5711.18, 5711.22, 5725.01, 5725.18, 5725.19, 5729.02, 5729.03 and 5729.06) of the Revised Code of Ohio are set forth in the Appendix hereto.

QUESTION PRESENTED

In summary form, the question presented is:

Whether a state statute imposing an *ad valorem* tax upon tangible personal property of foreign insurance companies authorized to do business in the state violates the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States when neither the particular tax nor any other personal property tax is imposed upon domestic insurance companies, although both kinds of companies are subject to the same real estate tax, neither is taxed on intangible personal property, and both are subject to a franchise tax which is always at least 50 per cent higher for the foreign companies?

STATEMENT OF THE CASE

The Appellant is a legal reserve, stock life insurance company organized and existing under the laws of Texas. It qualified to do business in Ohio as a foreign corporation in 1947 and has since continued its qualification and business in Ohio. It has paid its franchise tax annually (R. 8-9). As a foreign insurance corporation, Appellant's franchise tax is always at least 50% more than that of domestic insurance companies (App. 11a, 12a, 13a), and it is subject to exactly the same real estate taxes as are domestic insurance companies (App. 1a, 12a). Neither kind of company pays a tax on intangible personal property (App. 1a-2a, 12a).

The Appellant has never paid a personal property tax to the State of Ohio (R. 9). No attempt was made to collect such a tax from Appellant until 1959 (R. 9). This attempt was apparently based upon a ruling of the Tax Commissioner (Rule No. 211, November 18, 1957) requiring foreign insurance companies to make a return of their tangible personal property pursuant to section 5711.01 of the Revised Ohio Code (R. 15-16). This Rule did not include domestic insurance companies, and no attempt has ever been made to collect any personal property tax from them.

The Appellant promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it and not to domestic insurance companies, but supplied the Department of Taxation with the valuation of its furniture and fixtures in the State of Ohio for the years 1948 through 1960, and for the year 1961 (R. 9, 10). These valuations ranged from a low of $33,000 in 1948 to a high of $110,000 in 1958 (R. 2, 3). The contested taxes for the

two different periods (1948 through 1960, and 1961), initially treated as two separate cases, were heard as one case by the Board of Tax Appeals, by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio (R. 11 et seq).

The Board of Tax Appeals held that it had no authority to declare a statute unconstitutional under either the State or Federal Constitution, and accordingly, did not rule on the constitutional question here involved (R. 14-15, 17). In affirming the Board of Tax Appeals, the Court of Appeals, First Appellate District, State of Ohio, held that the personal property tax upon Appellant did not violate the Constitution of the United States (R. 24, 25). And the Supreme Court of Ohio dismissed the appeal to it on the same constitutional issue, "for the reason that no substantial constitutional question exists herein" (R. 26).

SUMMARY OF ARGUMENT

I.

In attempting to tax the tangible personal property (furniture and fixtures) of foreign insurance companies, but not of domestic insurance companies, the State of Ohio is denying the equal protection of its laws to the Appellant foreign insurance company.

It is rather surprising that such an attempt would be made in the face of a controlling decision by this Court in a similar case from Ohio (*Wheeling Steel Corporation* v. *Glander,* 337 U.S. 562 (1949)), outlawing a parallel *ad valorem* tax on accounts receivable of a foreign corporation, but not of domestic corporations.

In each case, the foreign corporation was subject to the same real estate taxes as the domestic corporation,

and in each case the foreign corporation had paid without challenge the franchise taxes required of it. Moreover, in the present case, it clearly appears that the franchise tax paid by the foreign insurance company is always at least 50% more than the franchise tax paid by a domestic insurance company on the same amount of business.

The lack of equal protection in Ohio's statutes taxing *tangible* personal property of a foreign insurance company, but not of a domestic insurance company, is further underscored by the fact that in the case of *intangible* personal property, Ohio affords equal protection in that both kinds of companies are relieved from taxes on intangibles.

II.

The defenses offered in support of the tax in question serve only to confirm its basic unfairness and invalidity.

The fact that the personal property of domestic insurance companies is not expressly "exempted," by that very word, can be of no consequence. The specific section under which the Appellant is taxed (Ohio Rev. Code, § 5711.01), "excludes" domestic insurance companies from the definition of "taxpayer"; and another section (Ohio Rev. Code, § 5725.25) provides that the real estate and franchise taxes paid by domestic insurance companies shall be "in lieu of all other taxes." This language seems pretty clear, but aside from the form used or not used, the substance is that under Ohio law, as construed and applied by its taxing authorities and highest court, domestic insurance companies are not required to pay the personal property tax being imposed upon Appellant.

The "possibility," adverted to by the Ohio Court of Appeals, of any kind of "equalizing" personal property tax being included in one of the two alternatives for the computation of the franchise tax against a domestic corporation is completely negatived by the fact that the domestic insurance company pays that alternative only if it is less than the other alternative which by statute is always less than the franchise tax of a foreign insurance company on the same volume of business (Ohio Rev. Code, §§ 5725.18-19, 5729.02-03).

There is nothing in the principle of "reasonable classification" which would warrant putting the furniture and fixtures of a foreign insurance company in one category and the furniture and fixtures of a domestic insurance company in a different category for *ad valorem* tax purposes.

There is no reason or necessity to look at the taxing laws of Texas, the home state of Appellant, in order to determine the inequality of Appellant's treatment in Ohio, since there is nothing in the Ohio taxing statute in question which makes its operation against Appellant or non-operation against domestic companies contingent in any way on the laws of Texas.

And finally, there is no "legislating" difficulty about the kind of relief required in this case. All that is required is that the present Ohio personal property tax be declared unconstitutional as applied to Appellant.

ARGUMENT

I. OHIO'S PERSONAL PROPERTY TAX ON ONLY FOREIGN INSURANCE COMPANIES IS CLEARLY DISCRIMINATORY IN FAVOR OF DOMESTIC INSURANCE COMPANIES, AND THEREBY DENIES APPELLANT THE EQUAL PROTECTION OF ITS LAWS

This is an exceptionally clean-cut case, in that only one kind of tax is being contested, and there is no dispute about the facts with respect to it.

While the state's taxing structure here involved includes three kinds of taxes, franchise, real estate, and personal property, as applied to two kinds of insurance companies, foreign and domestic, this litigation tests only the constitutional validity of one tax, namely, Ohio's *ad valorem* tax on tangible personal property used in business (furniture and fixtures) of a foreign insurance company, which tax is not imposed on domestic insurance companies.

A. Application of the Taxing Statutes Involved

A brief review of the application of the pertinent taxing statutes to the two different kinds of corporations would seem to be in order.

Taking the simplest first, the real estate of a foreign insurance company is subject to exactly the same tax and rates as that of a domestic insurance company (Ohio Rev. Code, §§ 5709.01 and 5725.25, App. 1a, 12a).

Similarly, Ohio's taxing statutes make no distinction between foreign and domestic insurance companies, in the case of taxes on *intangible* personal property (Ohio Rev. Code, §§5709.02, 5709.03, App. 1a-2a, 2a-4a). Both are, in effect, exempt from such taxes, foreign insurance companies being excepted therefrom in section

5709.02 (App. 1a-2a), and domestic insurance companies being relieved by virtue of section 5725.25 (App. 12a).

On their face, Ohio's franchise taxes on foreign and domestic insurance companies are somewhat more complicated, but the resulting tax impact is comparatively simple: The franchise tax on the foreign insurance company is always at least 50% more than the franchise tax on the domestic insurance company.

This result grows out of a fixed rate of franchise tax on the foreign insurance company, and one of two alternative rates on the domestic insurance company, depending upon which produces the lesser tax. More specifically, the Appellant, as a foreign insurance company, pays a fixed franchise tax rate of 2.5 percent on its gross premiums from business in Ohio, less certain deductions (Ohio Rev. Code, §§ 5729.02-03, App. 12a-13a); while Appellant's domestic competitors pay the lower of two tax computations, either

(a) .2 percent of the company's reported capital and surplus, less certain specified liabilities; or

(b) .2 percent of its gross premiums (less the same deductions as in the case of foreign insurance companies) multipled by eight and one-third. (Ohio Rev. Code, §§ 5725.18-19, App. 11a-12a).

The second alternative for domestic companies and the sole method for foreign companies is based on gross premiums, less the same deductions, but different rates are prescribed. For the foreign insurance company, a rate of 2.5 percent is applied to gross premiums after deductions. For the domestic company, a rate of .2 percent is applied to eight and one-third times the gross premiums after deductions, which means a rate

of 8⅓ times .2 percent, or 1.67 percent. Since a rate of 2.5 percent is 50% more than a rate of 1.67 percent, the conclusion is inescapable that in all cases, the foreign insurance company will pay a franchise tax at least 50% higher than that paid by the domestic insurance company doing the same amount of business. This disparity would be even greater if the computation under the first of the alternatives for the domestic insurance company resulted in a lower tax computation, since the domestic company pays only the lower of the two alternatives.

As previously noted, the Supreme Court of Ohio did not issue an opinion. According to the opinion of the intermediate appellate court (R. 21), the specific rule of the Tax Commissioner (Rule No. 211, November 18, 1957) merely "restates" the personal property tax law as the statute (Ohio Rev. Code, § 5711.01) shows it to be, namely, that Appellant is a "taxpayer" and its property used in business is "taxable property" under this statute, whereas the same statute "excludes" domestic insurance companies. For present purposes of testing the "equal protection of the laws" validity of the resulting application of the taxing statute in question, it doesn't make any difference whether this statute was self-operative or became operative only after the exercise by the Tax Commissioner of certain delegated authority. In either event, with the approval of the highest court in the state, the Appellant foreign insurance company would be required to pay, while its domestic insurance competitors are not required to pay, an *ad valorem* tax on personal property used in business. As this Court has expressly held, "the state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation

and its judicial interpretation." *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 570 (1949).

There is one other Ohio statutory provision which should be noted, namely, section 5725.25, which provides:

> ". . . but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code [relating to real estate and franchise taxes on domestic insurance companies] shall be *in lieu of all other taxes on the other property and assets of such domestic insurance company* and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest." (Emphasis added.)

From the opinion of the Court of Appeals of the First Appellate District of Ohio, it is not too clear whether the exclusion of the domestic insurance companies from the personal property tax in question is predicated primarily on the "excludes" portion of the "taxpayer" definition in section 5711.01, or on the "in lieu of all other taxes" language of section 5725.25. But here again, this is not important. The two provisions are consistent and the net result is all the same. Under Ohio law, as applied by its taxing authorities and approved by its highest court, the domestic insurance company pays (1) the same real estate taxes as the Appellant foreign insurance company, and (2) the same kind of franchise tax but always less than the Appellant foreign insurance company on the same volume of business, but (3) does not pay the personal

property tax which the Appellant is required to pay, or any other personal property tax.

B. Wheeling Steel Corporation v. Glander Is Controlling Here

It will be remembered that Appellant is not challenging the discriminatory franchise tax exacted from it by the State of Ohio on an annual basis. It might have been tempted to do so under the broad principles enunciated in the early authority of *Southern Railway Co.* v. *Greene,* 216 U.S. 400 (1910), involving a new franchise tax against a foreign railroad company having made great investments under a prior license for an indefinite period. In addition to the factual difference between that situation and this, the Appellant accepts the more modern line of authority recognizing that insofar as annual *franchise* taxes are concerned, the state is not required to admit a foreign corporation to carry on an intrastate business, and may license it upon terms it sees fit, apart from exacting surrender of rights derived from the United States Constitution. *Hanover Fire Insurance Co.* v. *Harding* (*Hanover Fire Insurance Co.* v. *Carr*), 272 U.S. 494 (1926); *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77 (1938).

However, a discriminatory *ad valorem* personal property tax against a duly licensed foreign corporation is truly "a horse of a different color." In this area, the leading Fourteenth Amendment case is *Wheeling Steel Corporation* v. *Glander, supra.* There, about fifteen years ago, this Court struck down, as violative of the equal protection clause of the Constitution, Ohio's *ad valorem* tax on accounts receivable of foreign, but not of domestic corporations. Speaking for

the Court,* Mr. Justice Jackson stated the controlling concept, at pages 571-572:

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), 272 US 494, 510, 511, 71 L ed 372, 380, 381, 47 S Ct 179, 49 ALR 713; Power Mfg. Co. v. Saunders, 274 US 490, 493, 497, 71 L ed 1165, 1167, 1169, 47 S Ct 678."

The fundamental discrimination involved in the *Wheeling Steel* case was spelled out by the Court as follows at page 572:

> "If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. *It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.*" (Emphasis added.)

The only minor factual difference between that case and this lies in the intangible nature of the personal

* The only dissent, by Justices Douglas and Black, was on the ground that a corporation is not a "person" within the meaning of the Fourteenth Amendment.

property there being subjected to an *ad valorem* tax as against the tangible personal property here involved. On principle, the two cases are indistinguishable.

As recognized by the Court in *Wheeling Steel,* there was nothing new about the applicable principle. Over 20 years before, in *Hanover Fire Insurance Co.* v. *Harding* (*Hanover Fire Insurance Co.* v. *Carr*), 272 U.S. 494 (1926) this Court found it to be a denial of the equal protection of the laws for the State of Illinois to tax 100 percent of the net receipts of a foreign insurance corporation while at the same time not taxing the net receipts of domestic insurance companies and taxing the personal property of both at a valuation reduced to one-half of 60 percent of full value. Speaking for the full Court, Mr. Justice Taft said, at pages 510-11:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; *but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.*" (Emphasis added.)

Timewise, in between *Hanover Fire* and *Wheeling Steel*, there was a sequel to *Hanover Fire*, from Illinois, which perhaps should be noted briefly if only to avoid some confusion which might otherwise result. The case referred to is *Concordia Fire Insurance Co.* v. *Illinois*, 292 U.S. 535 (1934). In that case, the Illinois tax on net receipts of a foreign insurance corporation for the years *1923-1926*, as reduced by the State Supreme Court, after proper scaling and debasement as in the case of personal property of domestic insurance companies, was upheld as against the claim that domestic insurance companies were not subjected to the same net receipts tax. On this feature the Court simply held that the foreign corporation taxpayer had not carried its burden of showing unlawful discrimination in that it had not shown the full tax situation of the domestic corporations. At page 548, the Court said:

> "For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax. For these reasons this claim of discrimination must fail."

Interestingly enough, in the same case, the Court found a denial of equal protection of the laws in the Illinois tax on net receipts of the foreign fire insurance company for the year *1927* on two grounds, (1) because it included receipts from casualty insurance, while casualty companies as such were not so taxed, and (2) because the tax for that year was laid on the full value of receipts without first debasing to 60% as was done with personal property of domestic fire insurance companies. *Concordia Fire Insurance Co.* v. *Illinois*, *supra*, at p. 550.

In the present case, there can be no doubt as to the full showing of the tax situation of the domestic insurance company, vis-a-vis the tax situation of the Appellant, and by the same token, there can be no doubt as to the resulting discrimination, or of the true basis for this discrimination. Appellant foreign insurance company is taxed on its tangible personal property used in business. Domestic insurance companies are not subjected to this or any other personal property tax. In its relation to the state for tax purposes, what possible distinction could there be, for example, between duplicate furniture and fixtures owned by a foreign insurance company and by a domestic insurance company? As with the same kind of accounts receivable in the *Wheeling Steel* case, the only possible difference obviously lies solely in the different residence of the owners.

II. THE DISCRIMINATORY TAX IN QUESTION CANNOT BE SUSTAINED ON ANY OF THE BASES OFFERED OR SUGGESTED BY APPELLEE OR THE OHIO COURTS

As previously noted, the Supreme Court of Ohio, without opinion, dismissed the appeal to it "for the reason that no substantial constitutional question exists herein" (R. 26).

We must look, therefore, to the opinion of the Court of Appeals for the First Appellate District of Ohio (R. 18-24), and to Appellee's statement opposing jurisdiction for grounds or reasons urged in support of the tax in question. Let us first consider the one argument which was made by Appellee in its opposing statement and which was also stressed in the Ohio Court of Appeals opinion (R. 21-22), namely, that the doctrine of *Wheeling Steel* does not apply here because there is no express statutory "exemption," in just that word, of domestic insurance companies from the personal property tax in question.

This argument is almost too strained to answer. While, as we shall see, literal exemption language is not required to accomplish non-liability for a tax, it is interesting to note that there was no express "exemption," in so many words, in the tax statutes involved in *Wheeling Steel.* Instead, there was some "shall not be subject" language and the exemption there referred to by the Court arose from a certification by the Tax Commissioner to the effect that the "reciprocal" provisions of the statute there involved (General Code of Ohio, §§ 5328-1 and 5328-2) had been *construed* and *applied* "so as to exempt" from taxation in Ohio accounts receivable of a domestic corporation arising from a sale by an agent having an office in another state, even though such goods be shipped from Ohio. *Wheeling Steel Corporation* v. *Glander, supra,* at p. 570. As there stated by the Court:

> "We deal with the taxing plan as an entirety as we find it in operation and pass only on the constitutionality of that which the State has asserted power and purpose to do."

More important than the absence of express exemption language is the inherent lack of merit in the claimed distinction. As this Court originally pointed out in *St. Louis Southwestern Railway Co.* v. *Arkansas,* 235 U.S. 350 (1914), at page 362:

> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

It is also interesting to note that, at one point in its opinion, the Court of Appeals did not hesitate to say:

> "The same section [5711.01] specifically excludes certain business from the definition of 'taxpayer.'

> Domestic insurance companies are excluded but are noted as 'otherwise taxed.'" (R. 20)

The only inaccuracy in this statement is that the note of "otherwise taxed" does not appear in section 5711.01. It appears, if at all, only in the form of the "in lieu of all other taxes" clause of section 5725.25 providing in effect that domestic insurance companies shall pay only real estate and franchise taxes. Here again, the real point is that it can make no possible difference whether the non-liability of the domestic insurance company for the personal property tax imposed on Appellant foreign insurance company arises from an express exemption, an implied exemption, an express exclusion in the specific taxing section, or from an "in lieu of all other taxes" provision of another taxing section. The result is all the same. As this Court graphically put it in a fairly recent case:

> "Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." (*Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

The opinion of the Ohio Court of Appeals suggests a few other possible justifications for the tax in question, which will be treated in the order offered.

First, "in passing," the Ohio Court noted that the foreign corporation is not "subject to the possibility of a tax upon its entire capital and surplus as is a domestic corporation" (R. 21). This has reference, of course, to alternative (a) for determining the lesser of two franchise taxes to be imposed on domestic insurance companies. As we have seen, there is no room here for a "hidden" tax on personal property used in business by the domestic insurance company. It pays franchise tax alternative (a) only if it is less than franchise tax alternative (b), which is bound to be less

than the franchise tax on Appellant foreign insurance company. When the foreign insurance company and the domestic insurance company are both subject to the same tax on real estate, the same franchise tax (except that this tax is always at least 50% higher for the foreign than for the domestic company on the same amount of business), and only the foreign company is required to pay a tax on tangible personal property, it can hardly be claimed that either the real estate tax or the franchise tax includes any kind of "equalizing" personal property tax on the domestic company.

Next, after the express exemption argument already considered, the Ohio Court falls back upon the general power of the state to effect "reasonable tax classification" (R. 22-23). Appellant has no quarrel with that general principle, but how can it be applied here so as to put the furniture and fixtures of one life insurance company, a foreign corporation, in one class, and the furniture and fixtures of another life insurance company, a domestic corporation, in another class? On this point, what this Court said in *Southern Railway Co.* v. *Greene, supra,* at p. 417, is still good law:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Next, it is mildly suggested by the Ohio Court (R. 22) that some kind of examination of the laws of Texas must be had in order to determine whether Ohio's personal property tax against Appellant, but not against

domestic insurance companies, is discriminatory against the former. However, the suggestion is not pursued by reference to any Texas statute; more importantly, there is, of course, no reciprocal type provision in the Ohio tax statute in question which makes its operation contingent in any way on the taxing statutes of Texas. The Ohio Court's reference (R. 22) to § 5729.06 of Ohio's Revised Code is completely beside the point. That retaliatory tax rate statute of Ohio relates only to *franchise* taxes and further insures the franchise tax advantage of domestic insurance companies over foreign insurance companies in Ohio. This statute provides, in effect, that if another state (Texas, for example) exacts a greater franchise charge from an Ohio insurance company than is provided for by Ohio statutes against a Texas insurance company, then the greater amount shall be charged against the Texas company in Ohio (App. 13a). This retaliatory Ohio franchise tax provision could not possibly affect in any way, much less equalize, the personal property tax required of foreign insurance companies, but not of domestic insurance companies, in Ohio. Even if Texas had (which it does not) a discriminatory *ad valorem* personal property tax which denied equal protection of its laws to foreign insurance companies, that would not lend any validity to Ohio's statute violating the same constitutional provision.

"Finally," the Ohio Court of Appeals found it "difficult to see how the complaining taxpayer could lawfully be granted the relief he seeks" (R. 23). The Court seemed to think that in order to grant effective relief, it would have to legislate by either writing in an exemption for foreign insurance companies which would favor them over other foreign corporations, or by writing in a personal property tax against domestic

insurance companies. The Ohio Court apparently misconceived Appellant's appeal. Appellant seeks no preferential treatment. On the contrary, Appellant seeks only equal *ad valorem* tax treatment with domestic insurance companies, and for that, no new legislation is required. All that is required is that the present Ohio personal property tax as now applied to foreign insurance companies, but not to domestic insurance companies, be declared unconstitutional. What, if anything, follows that in the way of personal property taxes against foreign and domestic insurance companies alike, would, of course, be up to the Ohio legislature in the first instance.

CONCLUSION

Based upon all the foregoing, it is submitted that there is no rational basis on which Ohio's *ad valorem* personal property tax against Appellant foreign insurance company, but not against domestic insurance companies, can be sustained. It is the clearest kind of denial of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, and should be so declared as applied to Appellant.

Respectfully submitted,

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APPENDIX

PERTINENT PROVISIONS OF REVISED CODE OF OHIO

§ 5709.01 Taxable property entered on general tax list and duplicate.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state, and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

§ 5709.02 Taxable property to be entered on classified tax list and duplicate.

All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII [57] of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall not be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business trans-

acted in this state by or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state and ownership interests of the depositors in incorporated financial institutions located in this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code, shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state and ownership interests of the depositors in incorporated financial institutions located outside of this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code, belonging to persons residing in this state, shall not be subject to taxation. Such property subject to taxation shall be entered on the classified tax list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

§ 5709.03 Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.

Property of the kind mentioned in this section, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner resides, under the circumstances following:

(A) Accounts receivable, resulting from the sale of property by an agent having an office in such other state

or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state.

(B) Prepaid items, when the right acquired thereby relates exclusively to the business transacted in such other state or to property used in such business.

(C) In the case of accounts payable, the proportion of the entire amount of accounts receivable, whenever arising, represented by those arising out of business transacted in such other state ascertained as provided in this section shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

(D) Deposits, other than those used in business outside of such other state, when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business, wherever transacted, shall be considered located in the state in which the owner resides, if an individual, or in which its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

(E) Money kept on hand at an office or place of business in such other state.

(F) Investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, when either:

(1) such investments represent obligations of persons residing in such other state or secured by property located therein;

(2) an officer or agent of the owner at the owner's office in such other state, has authority, in the course of the owner's business, to receive or collect the income thereon, the principal, or both, when due, or to sell and dispose of the same.

This section shall be reciprocally applied, so that all property of the kinds mentioned in this section having a business situs in this state shall be taxed in this state and no such property belonging to a person residing in this state and having a business situs outside of this state shall be taxed. The assignment of a business situs outside of this state to property of a person residing in this state, in any case and under any circumstances mentioned in this section, is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section is held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

§ 5711.01 Definitions.

[See, in particular, paragraph (B).]

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day,

without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

(B) "Taxpayer" means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. The tax commissioner may by regulations define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such regulation shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state.

"Taxpayer" excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or

public utilities, except to the extent they may be required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to make returns as fiduciaries.

(C) "Return" means the taxpayers' annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but fiduciary does not include trustees unless the sense requires that it shall do so.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or the holding or the sale thereof for the purpose of realizing income or profit

which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

§ 5711.18 Valuation of accounts and personal property; procedure; income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, his findings and recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

§ 5711.22 Listing and rates of personal property tax.

(A) Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated

on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day that they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.36, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either division (A) or division (B) of section 5701.06 of the Revised Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

(B) Personal property of a merchant which is sold or held for sale for the use or consumption by the purchaser from the merchant, and not for resale, and which is required to be returned on the average basis as provided in section 5711.15 of the Revised Code, and personal property as defined in section 5701.03 of the Revised Code used in the business of preparing, serving, and selling food in the form of meals suitable for immediate consumption by the purchaser, shall be listed and assessed as follows:

(1) In the return filed for the year 1964, the first one hundred thousand dollars thereof at sixty-six per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(2) In the return filed for the year 1965, the first one hundred thousand dollars thereof at sixty-two per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(3) In the return filed for the year 1966, the first one hundred thousand dollars thereof at fifty-eight per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(4) In the return filed for the year 1967, the first one hundred thousand dollars thereof at fifty-four per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(5) In the returns filed for the years 1968, and thereafter the first one hundred thousand dollars thereof at fifty per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(6) Where such property is located in more than one taxing district, the listing of the first one hundred thousand dollars thereof shall be apportioned to the various taxing districts wherein such property is located in the same ratio as the true value of such property in a taxing district bears to the total true value of such property wherever located in this state.

(C) Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

(1) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all engines, machinery, tools, implements, and domestic animals used in agriculture, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines,

machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(a) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(b) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith;

(c) Agricultural products on farms.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed.

§ 5725.01 Definitions.

As used in sections 5725.01 to 5725.26, inclusive, of the Revised Code: . . .

(C) "Insurance company" includes every corporation, association, and society engaged in the business of insurance of any character, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage, or acting as surety on bonds or undertakings.

(D) "Domestic insurance company" includes every insurance company organized and existing under the laws of

this state, and every unincorporated association and society formed for the purpose of engaging in said business in this state, and excludes every foreign insurance company.

(E) "Foreign insurance company" includes every insurance company organized or existing under the laws of any other state, territory, country, or the United States.

§ 5725.18 Annual franchise tax on the privilege of being an insurance company.

An annual franchise tax on the privilege of being an insurance company is hereby levied, measured by the smaller of the following bases as applied to a domestic insurance company:

(A) The capital and surplus of a domestic insurance company having capital divided into shares, or the surplus of a domestic insurance company not having capital divided into shares, at the value thereof reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and nonadmitted assets and the liabilities of the company, including in such liabilities:

(1) The reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company because of its outstanding policies in gross;

(2) Amounts set apart for the payment of dividends to policyholders, and all actual liabilities set forth in the annual statement;

(B) Eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year, after making the deductions prescribed by section 5729.03 of the Revised Code for foreign insurance companies. The objects of such tax are those declared in section 5725.24 of the Revised Code, to which only the same shall be applied.

§ 5725.19 Rate of franchise tax on domestic insurance companies.

In the month of June, annually, the auditor of state shall charge for collection from each domestic insurance company a franchise tax of two tenths of one per cent of the amount determined by the superintendent of insurance pursuant to section 5725.18 of the Revised Code and certified to the auditor of state. In no case shall such tax be less than twenty-five dollars.

§ 5725.25 Tax on real estate of domestic insurance company.

The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, shall be in lieu of all other taxes on the other property and assets of such domestic insurance company and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest. Sections 5725.01 to 5725.26, inclusive, of the Revised Code do not assess any tax on any foreign insurance company or affect any tax on a foreign insurance company under any laws of this state.

§ 5728.02 Annual statements of foreign insurance companies.

Every insurance company incorporated by the authority of another state or government shall set forth in its annual statement to the superintendent of insurance the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, less return premiums paid for cancellations and considerations received for reinsurance of risks within this state, provided that dividends paid or otherwise allowed to pol-

icyholders shall not be deducted except as provided in section 5729.04 of the Revised Code. If the superintendent has reason to suspect the correctness of such statement he may make an examination at the expense of the state of the books of such company or its agents for the purpose of verifying them.

Where insurance against fire is included with insurance against other perils at an undivided premium, a reasonable allocation from such entire premium shall be made for the fire portion of the coverage in such manner as the superintendent of insurance may direct.

§ 5729.03 Computation and collection of tax.

If the superintendent of insurance finds the annual statement required by section 5729.02 of the Revised Code to be correct, he shall compute an amount of two and one-half per cent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, and charge such amount to such company as a tax upon the business done by it in this state for the period covered by such annual statement. All taxes collected pursuant to this section shall be credited to the general revenue fund.

§ 5729.06 Retaliatory tax rate.

If the laws of another state, territory, or nation authorize charges for the privilege of doing business therein or taxes against insurance companies organized in this state exceeding the charges provided in sections 5729.01 to 5729.15, inclusive, of the Revised Code, like amounts shall be charged against all insurance companies of such state, territory, or nation doing business in this state, instead of the charges provided by said sections.